SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 861

E. P. PERINI, Superintendent
Marion Correctional Institution,

Petitioner,

vs.

DOMINIC COLOSIMO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To The Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, E. P. Perini, prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the Sixth Circuit, made herein on September 17, 1969, which judgment reversed the denial of respondent's quest for a writ of habeas corpus by the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW

The opinion of the District Court is attached hereto in the Appendix, *infra*, at page 16b. The Court of Appeals' opinion is likewise attached hereto, *infra*, at page 24b.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 17, 1969. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1); and, pursuant to Rule 19(b) of the Supreme Court Rules, petitioner believes that the decision of the Court of Appeals is in conflict with the decisions of both this Court and other Courts of Appeals.

QUESTIONS PRESENTED

1. May a warrantless search be upheld as incidental to a lawful arrest where, after a person is arrested and denies having a key to his car trunk, and after the accused's removal from the place of arrest, an abandoned key is found in the car in which the accused was transported by police, the trunk is opened with said key and the contents seized?
2. May a warrantless search of a car, which is kept in police custody at the place of arrest, be upheld on the grounds that the car, being closely connected with the reason for the arrest, was in the lawful custody of police officers and thus a proper subject for search?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citi-

zens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The record discloses that on March 19, 1964, Appellant Dominic Colosimo, together with one Sam Caputo, were indicted by the Grand Jury of Cuyahoga County, Ohio, for the crimes of unlawfully breaking and entering the locked compartment of a motor vehicle in two separate counts and for the possession of burglar's tools in a third count. The first and second counts were alleged to be second offense counts against Colosimo only.

The record also shows that a motion to suppress evidence was filed and a hearing held thereon, resulting in a denial of the motion.

On or about March 2, 1964, an airport radio air-traffic controller, from his vantage point in a glass-enclosed airport control tower overlooking the airport parking lot, observed two men in a white 1963 Pontiac acting suspiciously in respect to the trunk compartments of a 1963 Oldsmobile and a 1963 Cadillac parked in the lot. The controller was aware of a rash of auto break-ins at the airport parking lot and had earlier been requested to watch for persons tampering with autos in same. He reported the suspicious actions to his supervisor who, in turn, notified the police. The control tower men kept the two suspects under surveillance until the police arrived at the parking lot.

The officers were told by the controller that the two men had parked their Pontiac in a trunk-to-trunk position with the 1963 Oldsmobile. He then saw the trunk lid of the Pontiac go up, then the trunk lid of the Oldsmobile. The two

men then moved their Pontiac further along the parking aisle into a trunk-to-trunk position behind a 1963 Cadillac. Two officers, Sergeant Kopacka and Patrolman Sepesy, proceeded to the location on foot and two other officers in an Avis Rent-A-Car blocked the exit. When Officers Kopacka and Sepesy arrived at the scene, Sepesy noticed that the lock on the Cadillac was damaged (the outer ring of the trunk lock was missing) and he and Kopacka ordered the two men sitting in the Pontiac out of the car. Respondent, Colosimo, was one of the two men. The other was Sam Caputo. Both men were placed under arrest, denied that they had a key to the trunk, were placed in the Avis car and taken to the airport police office. Sergeant Kopacka remained at the scene to continue to investigate the incident.

Upon arrival at the airport, Police Officer Sepesy searched the rear seat of the Avis car where the suspects had been sitting and discovered a key between the seat and the seat back. Neither Colosimo nor Caputo acknowledged owning the key. Sepesy returned to the location of the Pontiac and Cadillac. He ascertained that the recovered key corresponded by number to the trunk lock of the Pontiac and opened the trunk, discovering therein tires and wheels other than the Pontiac's spare, and gloves and tools of a nature used by automobile burglars.

It further appears that respondent did not challenge the lawfulness of his arrest, but only the search and seizure of the automobile.

After exhausting his state remedies by way of appeal wherein the judgment of conviction was affirmed in the court of appeals on January 31, 1967, and the appeal therefrom was dismissed by the Supreme Court of Ohio on June 21, 1967, for the reason that no substantial constitutional question was involved, a petition for a writ of habeas corpus was filed in the United States District Court for the

Northern District of Ohio, Eastern Division. Based upon the pleadings filed therein, copies of all pleadings, and pertinent documents filed in the trial court, and upon a complete transcript of all proceedings held in the trial court, the District Court, on May 21, 1968, denied the writ of habeas corpus without a hearing. From the order of the District Court denying the writ, respondent appealed to the United States Court of Appeals for the Sixth Circuit. Said Court reversed on September 17, 1969. It is from the order of said Court that this petitioner petitions for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED IN HOLDING THAT RESPONDENT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN, AFTER HIS ARREST AND REMOVAL TO THE AIRPORT POLICE STATION, POLICE OFFICERS, UPON FINDING A KEY WHICH RESPONDENT DENIED OWNING IN THE CAR IN WHICH RESPONDENT WAS ESCORTED TO SAID STATION, RETURNED TO THE PLACE OF ARREST, OPENED THE TRUNK OF RESPONDENT'S CAR AND SEIZED CERTAIN ITEMS CONTAINED THEREIN.

A. The Search Was Incident To A Lawful Arrest And Was Reasonable In Light Of The Factual Context Of This Case, Despite The Fact That Respondent Had Already Been Removed From The Place Of Arrest.

In the District Court, respondent did not challenge the lawfulness of his arrest. Said Court noted, however, that the record would not, in any event, support such a challenge. Rather, the contention in said Court, which becomes

the basis of this petition, was that the search of the automobile in which appellant was sitting when arrested was not made incident to the arrest.

The facts are undisputed. From the time respondent and his co-defendant, Caputo, were first observed by airport officials until their arrest, they were under continued surveillance. During that period, they were observed in a Pontiac automobile approaching two automobiles in a trunk-to-trunk manner, with repeated trips from their automobile to the back of the other cars, in one case opening the trunk of a car and retreating to the security of their own car when other vehicles approached. Knowing that automobile break-ins had been prevalent in the parking lot, airport employees certainly had just cause for notifying police.

When the police arrived on the scene, equipped with knowledge given them by the observers, and noted that the lock of the Cadillac automobile, which was situated immediately behind the suspect's automobile, had been tampered with, they clearly had reasonable grounds to believe that a crime was being committed. Respondent and his co-defendant were ordered out of their Pontiac. The arresting officers asked for the key to the Pontiac's trunk but were told that the wife of respondent's co-defendant had it.

Respondent and his co-defendant were then removed, in an Avis Rent-a-Car, to the Airport Police Office. Upon their arrival, a key was discovered behind the rear seat of the Avis car, where respondent and his co-defendant had been sitting. Both respondent and his co-defendant denied ownership of same. In the meantime, one of the officers had remained at the scene and continued the investigation of the break-in. When the key was found, it was immediately returned to the scene, whereupon it was discovered that it fit the Pontiac trunk. Inside the trunk were found the

automobile burglars' tools and other objects which were later admitted into evidence over objection.

Upon these facts, the District Court determined that the search was reasonable and made incidental to a lawful arrest. In so doing the District Court was adhering to the Sixth Circuit's "reasonably contemporaneous" test as announced in *United States v. Smith,* 393 F. 2d 687 (6th Cir. 1968); *Crawford v. Bannon,* 336 F. 2d 505 (6th Cir. 1964), *cert. denied,* 381 U. S. 955; and *Arwine v. Bannon,* 346 F. 2d 458 (6th Cir. 1965), *cert. denied,* 382 U. S. 882.

The Sixth Circuit, however, reversed, finding that its "reasonably contemporaneous" test was no longer controlling. It may be noted that while the Court stated that it need not decide whether this Court's recent decision in *Chimel v. California,* 395 U. S. 752 (1969) is to be applied retroactively, petitioner believes that the Court in fact applied *Chimel* to the present case. The Court apparently was of the opinion that its previous applications of *Preston v. United States,* 376 U. S. 364 (1964), were faulty in light of the *Chimel* decision.

It is clear, of course, that this Court in *Chimel* indicated that the reasoning supporting *Preston* was reaffirmed. However, petitioner believes that the Sixth Circuit erroneously read *Preston* as encompassing the *Chimel* standards. *Chimel* restricts the scope of a search incidental to arrest to those situations where the arresting officers are justified in searching for weapons for their own protection or where they are justified in believing that evidence might be concealed or destroyed otherwise. *Preston,* however, did not so restrict the justifications for search incidental to arrest. As this Court stated in *Preston*:

> "The rule allowing contemporaneous searches is justified, *for example,* by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent

> the destruction of evidence of the crime . . . ." (Emphasis added) *Preston v. United States, supra,* at 367.

Thus, *Preston* was in keeping with the long standing doctrine that the Fourth Amendment did not proscribe a "reasonableness" test. See *United States v. Rabinowitz,* 339 U. S. 56, 66 (1950). This Court's use of the words "for example" clearly indicates that the *Chimel* restrictions were not applied in *Preston. Preston* left the door open for other justifications meeting the "reasonableness" test. Thus, when the Court of Appeals incorporated the *Chimel* standards into *Preston,* it committed error. Its decision is clearly at odds with *Preston* itself and the rules in several other Circuits which have determined that other justifications for search incidental to arrest may exist. See *United States v. Evans,* 385 F. 2d 824 (7th Cir. 1967); *United States ex. rel. Chambers v. Maroney,* 408 F. 2d 1186 (3d Cir. 1969); *Matthews v. United States,* 407 F. 2d 1371 (5th Cir. 1969); *United States v. Gorman,* 355 F. 2d 151 (2d Cir. 1965). See also *Adams v. United States,* 336 F. 2d 753 (D.C. Cir. 1964), *cert. denied,* 379 U.S. 977; and *Wright v. United States,* 404 F. 2d 1256 (D.C. Cir. 1968).

In the factual context of the present case, petitioner believes that the "reasonableness" test was met. Clearly, after respondent was removed from the scene and his automobile taken into police custody, there was no need for the officers to protect themselves by searching for weapons. Likewise, there was no reason to believe that evidence in the trunk might be concealed or destroyed. Yet, if the "reasonableness" test as announced by this Court is to have any meaning, it must include the present situation.

The fact that respondent and his companion abandoned the key to the Pontiac, after denying that either had it, is of particular importance. Perhaps, it could be argued

that the abandonment of the key was in effect an abandonment of the trunk and its contents. In any event, if, as respondent's co-defendant stated, his wife had possession of the key, then it would be clear that the trunk-to-trunk operation which was observed was not the criminal behavior supposed. When, however, a key was actually found, it was commendable police practice to refute their story at the outset by showing that the key, which was supposedly in the possession of Caputo's wife, was, in fact, at the airport and did, in fact, open the trunk. Furthermore, the observer had indicated that he saw the Pontiac trunk opened. If respondent and his companion had no key, then in all probability, the observer's story was false. To refute this possible contention, the officers wisely chose to open the trunk and thereby support the observer's story. If it had turned out that the key had not fit the trunk, it would be probable that innocent men were being held in custody. For the officers to delay their investigation in order to procure a search warrant would have resulted in an unnecessarily long detention of the innocent.

Police officers usually have no idea where a proper search may subsequently lead them. Oftentimes a speedy search might reveal evidence leading to accomplices who could be apprehended before fleeing the jurisdiction. See *United States v. Gorman, supra,* at 155. It might also lead to other evidence of a contraband nature from the same crime which could, if not gathered quickly, be concealed or destroyed by a cohort of those arrested.

In light of these considerations, petitioner believes the opening of the trunk was reasonable.

The facts in *Preston,* upon which the Court of Appeals based its reversal, are inapposite to the present case. Preston was arrested for *vagrancy.* Following his arrest and removal from the scene, his car was driven by a police

officer to the station and then towed to a garage. Later a police officer, being unable to get into the trunk, went through the back seat and found items linking Preston with a *conspiracy to rob* a federally insured bank. It was held that the search was "too remote in time or place" to be incidental to arrest.

In the present case, there was no remoteness in place inasmuch as the car was searched at the place of arrest. Nor was there remoteness in time inasmuch as the search was conducted shortly after respondent's arrest and immediately after the key was found. Furthermore, the car was kept in the custody of the police continually since officers had every reason to believe, through the observance of the trunk-to-trunk operation, that the trunk contained fruits or instrumentalities of the crime for which respondent was arrested. There was no search for, or seizure of, items unconnected with the arrest. Lower federal courts have found that these distinctions make *Preston* inapplicable. See *United States v. Trotta*, 401 F. 2d 514 (4th Cir. 1968); *Kimbro v. Henderson*, 277 F. Supp. 550 (W.D. Tenn. 1967); *United States v. Barnett*, 407 F. 2d 1114 (6th Cir. 1969). *cf. Barnett v. United States*, 384 F. 2d 848 (5th Cir. 1967). This Court has distinguished *Preston* on similar grounds: *Compare Cooper v. California*, 386 U.S. 58 (1967), *with Dyke v. Taylor Implement Company*, 391 U.S. 216 (1968).

As this Court stated in *Stoner v. California*, 376 U.S. 483 (1964), at 486:

> ". . . [A] search can be incident to arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."

In the factual context of the present case, the *Stoner* test was met. Consequently, petitioner contends that the Court of Appeals erroneously abandoned its "reasonably con-

temporaneous'' test in favor of the test laid down by this Court in *Chimel,* when there is no reason why *Chimel* should apply retroactively. See *Linkletter v. Walker,* 381 U.S. 618 (1965).

B. The Car, Being Intimately Connected With The Reason For Which Respondent Was Arrested, And Being In The Lawful Custody Of The Arresting Officers, Was A Proper Subject For Search.

From the time of the arrest of respondent and his companion to the time of the actual search, the Pontiac automobile in which they had been arrested was in continuous police custody. Officers had every reason to believe that the trunk contained evidence relating to the crime for which respondent was arrested.

In *Cooper v. California, supra,* this Court upheld a search, not as being incidental to arrest, but as being ''reasonable''. The defendant in *Cooper* had been arrested for a narcotics violation. Pursuant to a state statute, his car was seized and impounded. The search in question took place one week after the arrest. This Court distinguished *Preston.* The rationale underlying the decision was revealed when this Court stated:

> ''Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained.''

There is a striking resemblance between *Cooper* and the present case. Admittedly there is no Ohio statute specifically authorizing seizure of the car in cases such as this. However, in point of fact, seizures of automobiles as instrumentalities of crimes are the usual procedure. In the present case, of course, there was no actual ''impounding'' as in *Cooper.* Nor was there an appreciable delay between

the arrest and the search as was the case in *Cooper*. Petitioner believes, however, that these differences add to, rather than detract from, the reasonableness of the search. Petitioner contends that the essence of *Cooper* is not the existence of a statute but the fact that the retention was lawful and closely related to the reason for the arrest. See *People v. Rossolille*, 38 Ill. 2d 316, 231 N.E. 2d 585 (1967); *Gordon v. State*, 222 So. 2d 141 (Sup. Ct. Miss. 1969); *People v. Nugara*, 236 N. E. 2d 693 (Sup. Ct. Ill. 1968).

To hold *Cooper* applicable in the present case would not cause *Preston* to be eroded. This Court clearly recognized that no erosion was intended in *Dyke v. Taylor Implement Company, supra*. The defendant in *Dyke* had been arrested for reckless driving. Subsequently, without probable cause, a search was made of the defendant's car. An air rifle found in the car eventually led to defendant's conviction for a crime totally unrelated to the reason for his arrest. This Court held that *Preston* was controlling. *Cooper*, in this instance, was distinguished:

> "In the instant case there is no indication that the police had purported to impound or to hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purposes of such custody." *Dyke v. Taylor Implement Company, supra*, at 221.

On the basis of the foregoing, petitioner deems *Cooper* to be controlling in the instant case.

CONCLUSION

In conclusion, petitioner believes that law enforcement officers must be given some consideration in their day to day observance of duty. The fact that time permits the procurement of a search warrant should not control where an exercise of reasonable judgment dictates an immediate search, particularly, as in this case, when the officers are

more than reasonably certain that the search will reveal contraband of the crime for which the arrest was made.

Where such a search is made, and particularly when evidence of no other crime has been discovered, a respondent has not been harmed because the police did not sit in the car until a warrant could be procured. The subsequent search still would have disclosed the same evidence. Never, under the facts of this case, was a more reasonable search made. Nowhere is there to be found the overzealous police behavior which has prompted courts to demand that a search warrant was required.

Preston, upon which the Sixth Circuit based its decision, did not deem all searches subsequent to arrest unlawful per se. The Sixth Circuit, by what is in effect a retroactive application of *Chimel,* has rewritten *Preston* to that extent. Petitioner believes that this Court in *Preston* had nothing of the kind in mind. The lower courts, however, will only add to the confusion unless this Court sets up meaningful guidelines to follow.

On the basis of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was mailed to the respondent, via the United States mail, through the office of his attorney, Mr. Rod R. Mastrandrea, 2520 Lee Road, Cleveland Heights, Ohio 44118, this .....day of October, 1969.

LEO J. CONWAY
Attorney for Petitioner

APPENDIX

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A. Opinion of The United States District Court For The Northern District of Ohio, Eastern Division. (Filed May 21, 1968) ..... 16 - 23

B. Opinion of The United States Court of Appeals For The Sixth Circuit (Decided September 17, 1969) ..... 24 - 27

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT IN RE PETITION FOR A WRIT OF HABEAS CORPUS

(Filed May 21, 1968)

KALBFLEISCH, Ch. J.

Petitioner, by his attorney, has filed an amended petition for a writ of habeas corpus alleging that his detention by respondent, E. B. Perini, Superintendent of the Marion Correctional Institution, Marion, Ohio, is unlawful and that he is entitled to relief upon the following grounds:

1. Denial of a fair trial "in that the Common Pleas Court, Cuyahoga County, at the trial permitted the introduction of evidence of Petitioner's prior criminal conviction, notwithstanding that Petitioner had not taken the stand."

2. Double jeopardy "in that the indictment charged in two separate counts relating to the previous conviction as being present offenses."

3. Introduction into evidence, over a timely objection, of the contents of an automobile trunk compartment which had been obtained by the police as a result of "an unlawful search and seizure of an automobile operated and owned by a sister of the now deceased co-defendant."

Petitioner is presently serving indeterminate sentences in the Marion Correctional Institution, Marion, Ohio, imposed by the Common Pleas Court of Cuyahoga County upon petitioner's conviction by a jury for violations of Section 4549.041 and Section 2907.11 of the Ohio Revised Code. Petitioner's conviction was affirmed by the Court of Appeals for Cuyahoga County, Ohio, and petitioner's appeal from that affirmance was dismissed by the Ohio Su-

preme Court "for the reason that no debatable constitutional question exists herein."

In addition to the "return of writ" filed in his behalf, the respondent has provided to the Court the original bill of exceptions upon which petitioner's state appeals were taken, including the stenographic transcript of the proceedings at petitioner's trial and at the hearing conducted by the trial court upon petitioner's motion to suppress certain evidence. This Court also has been provided with copies of the original pleadings and the transcript of the Common Pleas Court's journal entries as filed in the Court of Appeals for Cuyahoga County, Ohio. Because of the inclusiveness of the record now before the Court, an oral hearing upon the amended petition is unnecessary.

At the outset, the Court observes that counsel for petitioner, by his brief in answer to the "return of writ," questions the procedures and actions of the state authorities in regard to the mittimus by which respondent asserts petitioner was delivered into his custody. It is not disclosed by the record that this issue has been presented to any state court. Since that claim does not arise from the proceedings at which petitioner was convicted, petitioner's traditional avenues of resort to the state courts do not appear to be foreclosed. Since petitioner has failed to exhaust his state remedies, this particular claim is not properly presented to this Court at this time. *Fay v. Noia*, 372 U.S. 391.

The indictment in three counts, returned March 3, 1964 against petitioner and his now deceased co-defendant, Sam Caputo, arises out of the breaking and entering March 2, 1964 of two automobiles parked in the Cleveland Hopkins Airport parking lot. A fair reading of the indictment discloses that counts one and two each charge breaking and entering of the locked compartment of an automo-

bile and that each further charges that petitioner is a second offender. Count three charges possession of burglary tools.

Petitioner claims he was denied a fair trial by admission into evidence of records of Cleveland Municipal Court Case No. 808410 in which case petitioner had entered a guilty plea on December 10, 1962 to charges of breaking and entering a locked motor vehicle on August 19, 1962, for which he was sentenced by that court.

Section 4549.041 and Section 4549.99 are as follows:

> "Section 4549.041 Unlawfully entering locked compartments.
>
> "No person shall unlawfully break and enter, or attempt to unlawfully break and enter, the locked compartment of any motor vehicle or trailer. Compartment as used in this section includes all areas of any motor vehicle or trailer wherein persons or property are normally transported."
>
> "Section 4549.99 Penalties.
>
> "(D) * * * Whoever violates * * * section 4549.041 [4549.04.1] of the Revised Code shall be fined not more than five hundred dollars or imprisoned not more than six months, or both, for a first offense; for each subsequent offense such person shall be imprisoned not less than one nor more than twenty years."

Petitioner was charged with having committed his second offense under Section 4549.041. Therefore, it was necessary for the State to prove that a first offense had been committed by petitioner and it was as evidence of this essential element of the offense charged in the indictment that the State introduced petitioner's Municipal Court record, for consideration by the jury. Under Ohio law, such records and only such records are proper evidence to show a previous conviction under these circumstances. 33 O. Jur. 2d 427. The record discloses that this rule of evidence was adhered to by the trial court. The trial judge adequately instructed the jury as to the separate elements of the of-

fense charged, requiring the jury to find to be proved the fact of petitioner's prior conviction in addition to the commission of the current offenses charged.

The Supreme Court of the United States recently affirmed the constitutionality of recidivist statutes and of trial procedures such as those of which petitioner here complains. *Spencer v. Texas,* 385 U.S. 554 (1967). The Court of Appeals for this Circuit has pointed out that in *Spencer,* "the majority of the United States Supreme Court has squarely determined that this procedure is not violative of the federal Constitution, even though the instructions may be 'inadequate' to vitiate the prejudice." *Wooliver v. Henderson,* CA 6, Case No. 18065 (Decided March 20, 1968).

Likewise, the United States Supreme Court has held that prosecution under recidivist statutes does not constitute double jeopardy. *Moore v. Missouri,* 159 U.S. 673 (1895), cited with approval in *Spencer v. Texas, supra,* at page 560.

Although, as previously stated, this Court has the complete transcript, copies of the indictment and other relevant portions of the record of the Common Pleas Court, and has carefully examined these records, a judicial review thereof as upon appeal is not available to petitioner upon a petition for habeas corpus. An examination of the proceedings of the trial court clearly reveals, however, that every safeguard of due process was afforded petitioner as well as every opportunity to challenge the form of the indictment, the admission of the evidence thereon and the court's instructions to the jury. The challenge to the sufficiency of the indictment implicit in petitioner's arguments does not state a federal constitutional question which may be reached by a petition for habeas corpus. *Kimbro v. Bomar,* 333 F. 2d 755 (1964).

Furthermore, the argument contained in petitioner's briefs to the effect that the jury found petitioner guilty of the 1962 offense rather than the offense charged in the indictment rests solely upon petitioner's tortured interpretation of the language of the jury's verdict. It must be pointed out that the jury was provided with alternative verdict forms prepared for its use and was thoroughly instructed by the trial judge as to the meaning and use of such forms. This Court finds no merit in petitioner's claim of double jeopardy in any respect, nor in his claim that he did not receive a fair trial because of the admission into evidence of his prior conviction.

Petitioner alleges a third ground for relief:

> "(3) In that there was an unlawful search and seizure of an automobile operated and owned by a sister of the now deceased co-defendant. There was ample time to obtain a search warrant but this was not done and the contents found in said trunk compartment of the automobile was introduced into evidence at the trial."

The record before this Court discloses that the alleged unlawful search of the car in which petitioner had been sitting took place at the scene of petitioner's arrest shortly after petitioner and his companion had been removed by the police to the airport police office.

An airport radar air traffic controller, who, following a rash of auto break-ins at the airport parking lot, had been asked by the police to watch out for persons tampering with autos in the airport parking lot, from his vantage point in the glass-enclosed airport control tower atop the highest building at the airport, overlooking the parking lot, observed two men in a white 1963 Pontiac acting suspiciously in respect to the trunk compartments of a 1963 Oldsmobile and and (sic) 1963 Cadillac parked in the airport parking lot. After observing their conduct through

binoculars, the radar air traffic controller notified his superior in the tower who in turn observed the conduct of the two men and notified the police detachment stationed at the airport. These two control tower employees kept the two suspects under surveillance until the police arrived in the parking lot and apprehended the petitioner.

Upon receiving the report from the control tower that two men in a white Pontiac had opened the trunk of a parked 1963 Oldsmobile and had moved their Pontiac further along the aisle to a trunk-to-trunk position behind a parked 1963 Cadillac, two police officers, Patrolman Sepesy and Sergeant Kopacka, were dispatched to the scene on foot, and two other officers were dispatched in an Avis Rent-a-Car, customarily used by the airport police, to block the driveway entrances to the parking lot.

Upon their arrival at the scene, Patrolman Sepesy observed that the trunk lock of the Cadillac was damaged and thereupon he and Sergeant Kopacka ordered the two men then sitting in the Pontiac, one of whom was petitioner, out of their car. When asked for the key to the Pontiac's trunk, petitioner's companion denied having it, stating that the car belonged to his wife and that she had the key to the trunk. Upon arrival at the scene of the other officers in the Avis car, petitioner and his companion were placed in the rear seat of the Avis car and, accompanied by Patrolman Sepesy, were taken to the airport police office. Sergeant Kopacka remained at the scene to continue the investigation of the incident.

As the petitioner and his companion were removed from the Avis car upon arrival at the airport police office, Sepesy searched the rear seat area of the Avis car where the two suspects had been sitting and discovered a key between the seat and the seat back. Neither petitioner nor

his companion acknowledged owning the key. Thereupon, Sepesy immediately returned with the key to the scene of petitioner's arrest where Kopacka was continuing his investigation. Sepesy ascertained that the number of the key he had recovered from the Avis car corresponded with the Pontiac trunk lock, and while Sepesy interviewed the owner of the Cadillac in regard to her complaint of damage to her car trunk lock, Kopacka, as part of his investigation, opened the Pontiac trunk with the key Sepesy had recovered, discovering therein tires and wheels other than the Pontiac's spare, gloves, and tools of a nature customarily used by automobile burglars. These items were introduced into evidence at petitioner's trial over the objection of his counsel, and are those here claimed by petitioner to have been obtained as a result of unlawful search and seizure.

Petitioner apparently does not challenge the lawfulness of his arrest and it is the Court's opinion that circumstances revealed in the record would not support such a challenge if made.

Therefore, petitioner's claim that "There was ample time to obtain a search warrant but this was not done * * *" raises only the question of the reasonableness of the search complained of. The United States Supreme Court has consistently held that "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz,* 339 U.S. 56, 66.

A contemporaneous search of the vicinity made incidental to a lawful arrest is a reasonable search. *Agnello v. United States,* 269 U.S. 20. See also *U.S. v. Smith,* CA 6, Case No. 17874 (decided May 3, 1968), and cases cited therein. In *Agnello,* it was stated, at page 30:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See Carroll v. United States, 267 U.S. 132, 158; Weeks v. United States, 232 U.S. 383, 392."

In petitioner's case the search was not conducted at another time and place as was the search disapproved in *Preston v. United States,* 376 U.S. 364. Here the search was conducted as a part of the investigation at the scene of the arrest and upon discovery at the airport of the Pontiac's trunk key concealed in the Avis car from which petitioner and Caputo had just disembarked. The search petitioner complains of was reasonable and made incidental to a lawful arrest.

A writ of habeas corpus is denied.

GIRARD E. KALBFLEISCH,
Chief Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided September 17, 1969)

Before: O'SULLIVAN, PHILLIPS and EDWARDS, *Circuit Judges.*

O'SULLIVAN, *Circuit Judge.* This is an appeal from District Court denial of appellant's petition for habeas corpus relief. Petitioner had been convicted in an Ohio state court of possession of burglar tools and breaking and entering automobiles in the parking lot of the Cleveland, Ohio, airport. He claims to have been unconstitutionally dealt with by the State of Ohio.

Petitioner says first that he was prejudiced when, to support his prosecution as a second offender, the prosecuting attorney brought his earlier conviction of crime to the attention of the jury. In *Spencer v. Texas,* 385 U.S. 554 (1967), the Supreme Court held that such practice by a state court does not offend the Federal Constitution. At the time of trial the law of Ohio did not forbid the practice.

Secondly, Colosimo avers that evidence used to convict him was obtained by a search violative of his Fourth Amendment rights. Occupants of a control tower at the Cleveland airport observed conduct of Colosimo which made it quite clear that he and another were engaged in the business of stealing from cars parked at the airport. Notified of this conduct, police officers had sufficient probable cause to arrest the petitioner and his associate. The suspected thieves were using a Pontiac automobile from the trunk of which incriminating evidence was seized by the arresting officers. The search conducted was not immediately contemporaneous with the arrest. After petitioner and his codefendant had been taken to the police station by the arresting officers, a key was discovered in the rear seat of the police car. When the petitioner and his co-

defendant denied having any knowledge of the key, one of the arresting officers, without first obtaining a search warrant, returned to the airport parking lot. The Pontiac automobile had in the meantime been kept in the custody of a police officer. After ascertaining that the number on the key that had been recovered from the police car matched the Pontiac trunk lock, the officers opened the trunk and seized the evidence complained of.

Preliminarily, and obedient to *Jones v. United States,* 362 U.S. 257 (1960), we note that the petitioner, having been charged with possession of burglar tools, is a "person aggrieved" by the search of the automobile and had standing to object to the search. See also *Mapp v. Ohio,* 367 U.S. 643 (1961).

The District Judge concluded that the search was lawful as being reasonably contemporaneous with the arrest. He relied on *United States v. Rabinowitz,* 339 U.S. 56 (1950), as did this Court in *United States v. Smith,* 393 F(2) 687, 689 (1968), in *Crawford v. Bannon,* 336 F(2) 505, 507 (1964), *cert. denied,* 381 U.S. 955, and in *Arwine v. Bannon,* 346 F(2) 458, 466 (1965), *cert. denied,* 382 U.S. 882. The facts of *Crawford v. Bannon, supra,* fit most closely those before us. There, upon probable cause, the defendant was arrested and taken away to the police station. Thereafter, and still at the scene of the arrest, the defendant's vehicle was searched. Such was true here—the search of the vehicle was made at the scene, but after petitioner was taken away. In *Crawford* as well as *Arwine,* we distinguished *Preston v. United States,* 376 U.S. 364 (1964), on the ground that in *Preston* the vehicle had been taken from the scene before the search was made. In *Crawford,* we held—believing that *Rabinowitz* justified such a holding—that the fact that at the time of the search there was no danger of harm to the officers or loss of evi-

dence of the crime, was not of controlling importance if the search was "reasonably contemporaneous" with the arrest. There, as here, the officers had time to seek a search warrant while they kept control of the vehicle.

We are now of the view, however, that since we made those decisions, and since the District Judge's ruling here, further illumination of the *Preston* decision by the Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969), requires a different result. In a case as this where there was sufficient opportunity to procure a search warrant after the defendant was arrested and taken to the police station and while the automobile to be searched remained in police custody, the search of an automobile without a warrant, away from defendant's person, cannot stand Fourth Amendment attack.

In *Preston v. United States*, 376 U.S. 364 (1964), a case in which the defendants' vehicle had been towed to a garage, and soon after the defendants had been booked, searched by the police without a warrant, the Court held:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

With the person, or persons, suspected of crime and the automobile to be searched both in police custody, the precipitous action of a warrantless search is no longer justified. It is true that in *Preston* the vehicle was searched at a point away from the scene of arrest, while here the ve-

hicle remained at the place where the defendant was arrested. *Chimel*, however, persuades us that such factual distinction is not of controlling importance. We believe that *Chimel* instructs us that the rule of *Preston*, decided prior to the trial here involved, is the law that controls this case. Therefore, we need not consider whether *Chimel* is to be given retrospective effect. The evidence seized should have been suppressed.

The judgment of the District Court is vacated and the case remanded, with instructions to grant the writ to be effective in 45 days unless Ohio has filed a petition for certiorari with the Supreme Court, or has indicated its intention of retrying appellant.